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Charles Harrison Barbee

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
The Honorable Wm. Fremming Nielsen

United States of America,

Plaintiff,

v.

Charles Harrison Barbee,

Defendant.

No. 2:96-CR-00258-WFN-1

**Supplemental Briefing**

On June 17, 2016, Mr. Barbee filed a motion pursuant to 28 U.S.C. § 2255. (ECF No. 381). That motion challenged his convictions pursuant to 18 U.S.C. § 924(c) reflected in Counts 3, 5, 7, and 9. (ECF No. 456 No. 6). That challenge was based largely on the Supreme Court decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). (ECF No. 381 at 6-13).

On June 24, 2019, the Supreme Court filed its decision in *United States v. Davis*, 139 S.Ct. 2319 (2019). In *Davis*, the Supreme Court held that the residual clause of 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague.

Supplemental Briefing

1 On June 25, 2019, Mr. Barbee filed a motion to lift the stay in this case. (ECF  
2 No. 396). On July 1, 2019, the Court granted that motion, and ordered supplemental  
3 briefing by the parties. (ECF No. 397).

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5 After full briefing, the Court subsequently granted Mr. Barbee's motion in part,  
6 and denied it in part. (ECF No. 407). The Court ordered supplemental briefing  
7 regarding resentencing procedures, and this briefing is submitted pursuant to that  
8 order. (ECF No. 407 at 4).

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11 **I. Procedural posture**

12 The Court previously sentenced Mr. Barbee as follows

13 Count 1 (conspiracy)	60 months
14 Count 2 (arson)	168 months
15 Count 3 (use of a firearm during arson)	<b>360 months</b>
16 Count 4 (armed bank robbery)	168 months
17 Count 5 (use of a firearm during bank robbery)	<b>life</b>
18 Count 6 (arson)	168 months
19 Count 7 (use of a firearm during arson)	<b>life</b>
20 Count 8 (armed bank robbery)	168 months
21 Count 9 (use of a firearm during armed bank robbery)	<b>240 months</b>
22 Count 10 (transportation of a stolen vehicle)	120 months

Count 11 (transportation of a stolen vehicle) 120 months

Count 12 (possession of an unregistered grenade) 120 months

The use of a firearm counts were ordered to run consecutively (reflected above **in bold**) while the other counts were ordered to run concurrently. Thus, Mr. Barbee's sentence could be expressed as 168 months + 360 months + life + life +240 months, for a total of 768 months + life + life.

The Court's ruling set aside the 360 month sentence reflected in Count 3, and the life sentence in Count 7. Although it might appear on first glance that the life sentence in Count 5 and 240 month sentence in Count 9 remain in force (thus rendering the remaining sentence at 168 months + 240 months +life), such an interpretation is incorrect.

## **II. A new sentencing hearing is required on all counts based on the sentencing package and unbundling doctrines**

Under habeas corpus jurisdiction conferred by 28 U.S.C. § 2255, the district court has "broad and flexible power in its actions following a successful § 2255 motion." *United States v. Handa*, 122 F.3d 690, 691 (9<sup>th</sup> Cir. 1997)(citing *United States v. Davis*, 112 F.3d 118, 121 (3d Cir. 1997)). See also, e.g., *United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1184 (9th Cir. 2000). This power allows a court to change punishments previously handed down under the theory of a "sentencing package":

1 The court construes the multiple sentences given a defendant convicted of  
2 more than one count of a multiple count indictment as ‘a package,’ reflecting  
3 the likelihood that the sentencing judge will have attempted to impose an  
4 overall punishment taking into account the nature of the crimes and certain  
5 characteristics of the criminal. When part of the sentence is set aside as illegal,  
the package is ‘unbundled.’ After the unbundling the district court is free to put  
together a new package reflecting its considered judgment as to the punishment  
the defendant deserves for the crimes of which [she] is still convicted.

6 *United States v. Handa*, *supra*, at 692. *United States v. McClain*, 133 F.3d 1191, 1193 (9th  
7 Cir. 1998), confirms that district courts have jurisdiction to resentence as they deem  
8 appropriate.

9 The Ninth Circuit treats a sentence imposed on multiple counts as a “package.”  
10 *United States v. Moreno-Hernandez*, 48 F.3d 1112, 1116 (9th Cir. 1995)(noting that on  
11 remand “court was free to reconsider the entire ‘sentencing package’ and to  
12 restructure the sentences”) (*citing United States v. Jenkins*, 884 F.2d 433, 441 (9th Cir.  
13 1989)). Where a defendant is sentenced on multiple counts – as is the case here -- and  
14 one or more counts are overturned on appeal, the sentencing “package” comes  
15 “unbundled,” and the district court has the authority to resentence as it sees fit. *See*  
16 *Ruiz-Alvarez*, 211 F.3d at 1184. The logic is simple - the resentencing court should be  
17 able to “put together a new package reflecting its considered judgment as to the  
18 punishment the defendant deserve[s] for the crimes of which he [i]s still convicted.”  
19

20 *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998). Therefore, this Court  
21 should order a full resentencing on the remaining counts. *Dean v. United States*, --- U.S.  
22 ---, 137 S. Ct. 1170 (2017) (under sentencing doctrine package, when counts were  
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1 sentenced together as a package and one conviction is subsequently invalidated, court  
2 has authority to vacate the entire sentence and begin the sentencing process anew).

3 Mr. Barbee is entitled to be present at his sentencing hearing. He requests that  
4 the Court respect his right to be physically present at sentencing.  
5

6  
7 **III. Mr. Barbee is entitled to a plenary resentencing hearing under current**  
8 **law**

9 On December 18, 2018, Congress enacted the First Step Act (“the Act”).  
10 Section 403 of the Act revised § 924(c)(1)(C) by providing that the higher penalty for  
11 a “second or subsequent count of conviction” under § 924(c) is triggered only if the  
12 defendant has a prior § 924(c) conviction that has become final. Further, the Act  
13 provides that the amendments to § 924(c) shall apply to any offense that was  
14 committed before the date of enactment of the Act if a sentence for the offense has  
15 not been imposed as of such date of enactment. *See* First Step Act of 2018, Pub.L.No.  
16 115-391, § 403(a), 132 Stat. 5194, 5221-22.  
17  
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19 At his upcoming resentencing hearing, Mr. Barbee is entitled to the benefit of  
20 Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194,  
21 5221-22 (“the First Step Act”), enacted December 18, 2018. He is entitled to the benefit  
22 of that section because plenary sentencing hearings are conducted based upon the  
23 current state of the law.  
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1 That section of the First Step Act reads as follows:

2 **SEC. 403. CLARIFICATION OF SECTION 924(c) OF TITLE 18,**  
3 **UNITED STATES CODE.**

4 (a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code,  
5 is amended, in the matter preceding clause (i), by striking “second or  
6 subsequent conviction under this subsection” and inserting “violation of this  
7 subsection that occurs after a prior conviction under this subsection has  
8 become final”.

9 (b) APPLICABILITY TO PENDING CASES.—This section, and the  
10 amendments made by this section, shall apply to any offense that was  
11 committed before the date of enactment of this Act, if a sentence for the  
12 offense has not been imposed as of such date of enactment.

13 This clarifying section is critical here. Mr. Barbee had no prior convictions for section  
14 924(c) violations. Therefore, if applicable, section 403 dictates that Mr. Barbee is not  
15 subject to enhanced penalties for section 924(c) violations.

16 The Supreme Court has made clear that a plenary resentencing is conducted on  
17 a blank slate. *See Pepper v. United States*, 562 U.S. at 507 (court of appeals’ decision  
18 setting aside Pepper’s entire sentence and remanding case for a de novo resentencing  
19 “effectively wiped the slate clean”). Mr. Barbee is entitled to application of the First  
20 Step Act at his upcoming *de novo* sentencing hearing. Where a conviction is vacated  
21 and remanded for resentencing, the district court must “sentence the defendant as he  
22 stands before the court on the day of sentencing.” *United States v. Quintieri*, 306 F.3d  
23 1217, 1228-30 (2d Cir. 2002) quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir.  
24 2000). “ ‘[A] court’s duty is always to sentence the defendant as he stands before the  
25 court on the day of sentencing.’ ” *Quintieri*, 306 F.3d at 1230 (*quoting United States v.*

1 *Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (*per curiam*)). This is true whether a conviction  
2 is vacated after a successful direct appeal or a successful 28 U.S.C. § 2255 petition.

3 *United States v. Gordils*, 117 F.3d 99, 102 (2d Cir. 1997).

4  
5 “The general rule is that a defendant should be sentenced under the law in  
6 effect at the time of sentencing.” *United States v. Grimes*, 142 F.3d 1342, 1351 (11th Cir.  
7 1998) (*citing, inter alia, United States v. Guardino*, 972 F.2d 682, 687 (6th Cir. 1992)). As  
8 relevant here, however, this general rule has been interpreted to mean that an  
9 intervening change in statutory law applies at a resentencing even though the change  
10 in law was not the basis for reversal or vacatur. *See, e.g., United States v. Hinds*, 713 F.3d  
11 1303, 1304 (11th Cir. 2013) (*per curiam*) (the Fair Sentencing Act applies to defendants  
12 whose offenses occurred prior to August 3, 2010, the date on which the statute took  
13 effect, but who were resentenced after August 3, 2010); *United States v. Flanagan*, 80  
14 F.3d 143, 144 (5th Cir. 1996) (“safety valve” provision, 18 U.S.C. § 3553(f); U.S.S.G. §  
15 5C1.2, enacted after defendant’s original sentencing, applied to resentencing on  
16 remand); *see generally Quintieri*, 306 F.3d at 1230 (“[E]ven when a remand is limited, an  
17 issue may be raised if it arises as a result of events that occur after the original  
18 sentence.”) (*citing Bryson*, 229 F.3d at 426 (holding that even when the remanding  
19 opinion ordered resentencing at a specific offense level, the district court could depart  
20 from this level if there were “intervening circumstances”); other citation omitted)).  
21 Specifically, an intervening change in statutory law applies at a resentencing after  
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1 direct appeal or on collateral review although the change in law was not the basis for  
2 reversal or vacatur. *See, e.g., United States v. Hinds*, 713 F.3d 1303, 1304-05 (11th Cir.  
3 2013) (Fair Sentencing Act (“FSA”) applies on resentencing after direct appeal); *United*  
4 *States v. Hudson*, 685 F.3d 1260, 1260-61 (11th Cir. 2012 (en banc) (FSA applies to all  
5 defendants resentenced on collateral review); *United States v. Flanagan*, 80 F.3d 143, 144  
6 (5th Cir. 1996) (safety valve statute, enacted after defendant was first sentenced,  
7 applies at resentencing after direct appeal); *United States v. Polanco*, 53 F.3d 893, 898  
8 (8th Cir. 1995) (directing district court to apply new safety valve statute on remand  
9 after direct appeal).

12 Although the application of § 403 of the First Step Act is a relatively new issue,  
13 the Second Circuit has intimated, in dicta, that § 403 applies on remand. *United States v.*  
14 *Brown*, 935 F.3d 43, 48 & n.1 (2d Cir. 2019) (“Resentencing will also afford Brown the  
15 opportunity to argue that he should benefit from section 403(b) of the First Step Act  
16 of 2018.”). District courts addressing the issue have concluded that Section 403 of  
17 applies on remand. *See, e.g., United States v. Jackson*, No. 1:15 CR 453-001, 2019 WL  
18 2524786, at \*1 (N.D. Ohio June 18, 2019)(“The Court finds that the express language  
19 in Section 403(b) demonstrates Congress’s intent to apply the Section 924(c) penalty  
20 provisions retroactively.”); *See also id.* at \*2 (internal citation omitted):

23 Congress is presumed to enact laws with a full understanding of  
24 “background” legal principles. One such background principle is the  
25 nature of general remands for re-sentencing. When a court of appeals  
remands a case for re-sentencing, the district court begins anew. . . . Thus,



1 although this Court may have “imposed” a sentence prior to the First Step  
2 Act’s enactment, that sentence was in essence vacated upon the Sixth  
3 Circuit’s decision to vacate the conviction and remand for re-sentencing. .  
4 . . It makes little sense to interpret Section 403(b) in a manner that  
prevents a defendant from the application of an expressly retroactive  
amendment based on a sentence that became, in essence, a nullity.

5 *See also United States v. Uriarte*, No. 09-CR-332-03, 2019 WL 1858516, at \*1-\*2 (N.D.  
6 Ill. Apr. 25, 2019) (holding that § 403(a) of the First Step Act applies retroactively,  
7 concluding, “When a case is remanded for a general resentencing, the court writes ‘on  
8 a clean slate’ when fashioning the sentence.”)).  
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#### 10 11 **IV. The current sentencing posture**

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13 Based upon the sentencing packaging and unbundling doctrine, as discussed *ante*,  
14 Mr. Barbee is subject to resentencing on the following counts, now that Counts 3 and  
15 7 have been vacated:

16 Count 1 (conspiracy)

17 Count 2 (arson)

18 Count 4 (armed bank robbery)

19 Count 5 (use of a firearm during bank robbery)

20 Count 6 (arson)

21 Count 8 (armed bank robbery)

22 Count 9 (use of a firearm during armed bank robbery)

23 Count 10 (transportation of a stolen vehicle)

1 Count 11 (transportation of a stolen vehicle)

2 Count 12 (possession of an unregistered grenade)

3 Regarding Counts 5 and 9, however, because section 403 of the First Step Act applies,  
4 Mr, Barbee is not subject to sentencing for second or subsequent convictions.  
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6  
7 **V. Conclusion**

8 For all these reasons, Mr. Barbee respectfully requests that the Court schedule a  
9 re-sentencing hearing in accordance with the arguments raised herein. Mr. Barbee also  
10 requests that the Court order that a new Presentence Investigation Report be prepared  
11 which reflects the dismissal of counts, and is updated to reflect his prison record and  
12 any other changes in Part C.  
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17 Dated : November 22, 2019

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**Certificate of Service**

I hereby certify that on November 22, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Joseph H. Harrington, United States Attorney.

*s/ Matthew Campbell*  
Matthew Campbell